ADR SUMMER LUNCHEON

Impasse-Breaking in Mediation

Thursday, July 28, 2011

3rd Floor Cafeteria, South Wing
United States District Court, Eastern District of New York
225 Cadman Plaza East, Brooklyn, New York

Gerald P. Lepp
ADR Administrator

Bryan Wolin
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ADR Interns

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TAB 1

Impasse-Breaking in Mediation

EDNY Mediation Luncheon
July 28, 2011
1:30PM - 2:30PM

AGENDA

1:30-1:35 pm Welcome and Introduction

1:35-2:00 pm PowerPoint Presentation drawn from article: The Technique of No Technique: A Paean to the Tao te Ching. Discussing impasse breaking techniques in mediation and showing the importance of character, presence and attitude as fundamental to the mediation process and key to overcoming impasse.

2:00-2:25 pm Participants present challenges they have encountered in mediation and possible solutions to impasse.

2:25-2:30 pm Closing. Instructor will address final questions from the participants and deal with any remaining issues.

TAB 2

Resolve Mediation Services, Inc.

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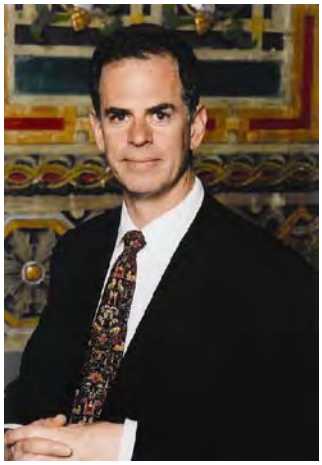
Simeon H. Baum
President



Simeon Baum, President of Resolve Mediation Services, Inc., has successfully mediated over 900 disputes. He has been active since 1992 as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator and arbitrator in a variety of cases, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site, and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine's 2005 - 2011 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011.

An attorney, with over 25 years' experience as a litigator, Mr. Baum has served as a mediator or ADR neutral in a wide variety of matters involving claims concerning business disputes, financial services, securities industry disputes, reinsurance and insurance coverage, property damage and personal injury, malpractice, employment, ERISA benefits, accounting, civil rights, partnership, family business, real property, construction, surety bond defaults, unfair competition, fraud, bank fraud, bankruptcy, intellectual property, and commercial claims.

Mr. Baum has a longstanding involvement in Alternative Dispute Resolution ("ADR"). He has served as a neutral for the United States District Courts for the Southern and Eastern Districts of New York Mediation Panels; New Jersey Superior Court, Civil Part, Statewide; Commercial Division, New York State Supreme Court, New York & Westchester Counties; U.S. Bankruptcy Court, Southern & Eastern Districts of New York; the New York Stock Exchange; National Association of Securities Dealers; the U.S. Postal Service, the U.S. Equal Employment Opportunity Commission, and CPR, among others.

Mr. Baum's peers have appointed him to many key posts: e.g., Member, ADR Advisory Group, Commercial Division, Supreme Court, New York County; ADR Advisory Group and Mediation Ethics Advisory Committee, N.Y. State Unified Court System. Founding Chair of the N.Y. State Bar Association's Dispute Resolution Section, he was also subcommittee chair of the N.Y. State Bar Association's ADR Committee; Legislative Tracking Subcommittee Chair of the ADR Committee of the Litigation Section of the American Bar Association; Charter Member, ABA Dispute Resolution Section Corporate Liaison Committee; President-Elect, Federal Bar Association's SDNY Chapter, and Chair of the FBA's national ADR Section. He is past Chair of the New York County Lawyers Association (NYCLA) Committee on Arbitration and ADR. Besides serving on the NYCLA's Committee on Committees, he is past Chair of the Joint Committee on Fee Dispute and Conciliation (of NYCLA, ABC NY, and Bronx County Bar Associations), and is on the Board of Governors, NYS Attorney-Client Fee Dispute Resolution Program. He is also a Fellow of the American Bar Foundation.

Mr. Baum has shared his enthusiasm for ADR through teaching, training, extensive writing and public speaking. He has taught ADR at NYU's School of Continuing and Professional Development, and he teaches Negotiation, and Processes of Dispute Resolution (focusing on Negotiation, Mediation and Arbitration) at the Benjamin N. Cardozo School of Law. He developed and conducts 3-day programs training mediators for the Commercial Division, Supreme Court, New York, Queens, and Westchester Counties. He has been a panelist, presenter and facilitator for numerous programs on mediation, arbitration, and ADR for Judges, attorneys, and other professionals. Mr. Baum is a graduate of Colgate University and the Fordham University School of Law.

TAB 3

Sausage Making Laid Bare – The Consensus Based Risk Allocation Model and other Impasse-Breakers and Approaches to Multiparty Naysayers (when each one points the finger at the other as the more culpable party).

By: Simeon H. Baum**

One of a mediator's great joys, challenges and justifications can be found in the multi-party matter. Multi-party conflicts or disputes arise in every conceivable dimension of society. Take for example a school board's decision in renewing a teachers' union contract. Each Board member can have diverse views and interests; within the union there might be different views, interest groups and political factions; school administrators bear different views and interests; and the public itself – parents, students, and taxpayers affected by the decision – consists of multiple and divergent stakeholders. Zoning Board decisions; end of life decisions involving large families (perhaps with second marriages); plant closings; any union negotiation; environmental resource use decisions – all involve multiple parties. Indeed, moving from business into municipal, state, national or international arenas, the set of multiparty disputes casts a wide net.

The broad array of multiparty disputes produces a wide range of issues, a host of which fall outside the focus of this paper but bear mention. These include the problem of convening itself. Identifying interest groups, selecting their representatives in what would otherwise be an impossibly unwieldy discussion, and managing intraparty communication are just a few of the threshold challenges in mediating these matters. As environmental mediators know all too well, it can even be a challenge to find a common legal framework that creates a shared sense of risk. Upstream users of water in Vermont affecting the availability or condition of water in downstream states might eventually have an impact on the environment and users of natural resources as far south as the Chesapeake Bay. Local authorities in the downstream states might have no authority to regulate upstate users. EPA regulators have, at times, convened sessions of stakeholders for "reg/neg," or negotiated rulemaking to address these problems.[1]

Several years ago, CPR's annual meeting featured an exercise in facilitated multi-party negotiation, drawing on the hypothetical of rebuilding the World Trade Center. It was an excellent display of the unique features of multiparty negotiations and the ways in

[1] These observations were raised by David Batson of the EPA and others at an all-day conference entitled "Changing Times, Changing Legal Practice: Effective Legal Strategies to Resolve New Environmental Disputes," held at The University Club in New York City (One West 54th St) on November 17, 2009. The Conference was presented by Pace Law School's Kheel Center on the Resolution of Environmental Interest Disputes, included Lowenstein Sandler PC, Leyland Alliance and Wilson Elser Moskowitz Edelman & Dicker LLP as co-sponsors, and had a good number of participating sponsors, including the Federal Bar Association's Alternative Dispute Resolution Section; Federal Bar Association's Environment, Energy, and Natural Resources Section; American Bar Association Section of Environment, Energy, and Resources; Environmental Law Institute; New York City Bar Environmental Law Committee; nPace Law School Center for Environmental Legal Studies; and the New York State Bar Association's Dispute Resolution Section.

which they benefit from a neutral facilitator.[2] In that post 9/11 scenario, five divergent groups struggle to arrive at a mutually acceptable solution to questions of how the WTC site will be used (memorial or commercial), who will pay for the rebuilding, and who will get credit for posterity. This negotiation is held in the shadow of media coverage. Three of the five stakeholders (victims' families, State, and City, as well as insurers and developer) involve numerous members. In view of the pressure applied by constituents "outside the room" it was important to be able to structure a constructive discussion in which all could strive for consensus.

This WTC scenario underscores the value a neutral party might bring. The neutral can help develop a good structure for talks, identify interests and issues, help in setting and revising the agenda, conduct caucuses, deal with the formation of independent cabals, assist in brainstorming, help with reality testing, and maintain constructive focus as the terms of this multi-factorial deal are hammered out. One enhanced challenge for the mediator in this type of negotiation is working the balance between remaining a background player – a facilitator – drawing out the parties' interests and thoughts for resolution – while exerting sufficient influence to maintain a structured and progressive discussion. There is a tangible risk that relations and communications will fray where each group excessively asserts its own interest and stalls consensus seeking talks by filibustering, table pounding, or withdrawal. The mediator brings value here by developing a transparent process while preserving the ability to caucus, and fundamentally, by keeping people at the table. With all of this activity, the artful mediator is challenged to keep the "less is more" philosophy of neutral intervention close at hand.

Shifting from the host of public and community disputes and deal-making, we now turn to the realm of civil litigation. Perhaps first in mind for litigators is the multi-defendant case, *e.g.*, construction cases, or third party liability matters, where multiple defendants and third or fourth party defendants have been added to the fracas. Often insurers are involved here. Similarly, there is the class action, or its variant, the multi-plaintiff case. Beyond these, legion are the areas where multiple parties and interest groups are involved in litigation.

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[2] "Rebuilding the World Trade Center Site – An Exercise in Multi-Party Negotiation" presented by Professor Lawrence Susskind of the Harvard Law School Program on Negotiation, draws on taped segments of a 90 minute exercise used by participants in the January 2007 Annual meeting of CPR (now the International Institute for Conflict Prevention and Resolution).. Each of the multiple groups consists of six participants, representing (1) the families of those who died as a result of the collapse of the World Trade Center buildings on September 11, 2001; (2) the State/Port Authority, representing the Owner of that land; (3) the City of New York: (4) the Silverstein group, which had a longterm lease for the site and was responsible for rental payments and rebuilding; (5) the insurer for the collapsed buildings; and (6) a facilitator charged with fostering a constructive negotiation. The tape and associated materials can be purchased at: http://www.pon.org/catalog/product_info.php?products_id=417. This author was part of a CPR working group that developed the initial problem, under the guidance of Peter Phillips of CPR. The raw material for that program was reworked and refined by Professor Susskind and his students prior to the January 2007 CPR Annual Meeting. An obvious takeaway from this roleplay is that – with divergent interest groups under public scrutiny, the tendency to form caucuses among fewer than all participants, and the need for consensus – the participants benefitted greatly from having a facilitator manage the discussion.

The Consensus Based Risk Allocation Model

Civil litigators are all too familiar with one phenomenon in the multi-defendant case – mutual finger pointing. When asked who bears responsibility for a particular occurrence or loss, defendants have a tendency to direct attention away from themselves and seek to shift the burden of payment onto one or more of the other defendants. In construction related cases, or the third party insurance world in general, this is a frequent occurrence. Often, counsel or claims adjusters will enter a negotiation with a predetermined percentage which they believe their company should bear relative to the other defendants. Moreover, they have set views on the percentage responsibility the other parties should bear as well – particularly party X, whom they deem to be the chief target, or party Y, who was in a position similar to their own. This scenario can generate feelings among professionals not unlike sibling rivalry.

Over the course of several mediations in which this common phenomenon arose, I developed and refined an approach that has proven to be consistently effective in extricating multiple defendants from the quagmire of mutual finger pointing. This approach can be termed a *consensus based risk allocation model*. It can be seen as an effort to garner information from the parties themselves and to have the solution to their imbroglio emerge from their own thought processes, rather than have it independently developed and pronounced by the mediator. Because it involves an amalgamation of their collective thoughts, it is seen as consensus based. It is termed a "risk allocation" model because it involves the thought processes of all defendants (including counsel and insurance representatives) in assessing how risk of loss at trial should be assessed and allocated among all of the defendants.

Before describing this process, one social psychological phenomenon bears noting. Defendants can get hung up on relative percentages, and on looking over their shoulders at what the other defendants are contributing. Dealing with hard dollars can help disengage defendants from this inter-party struggle. The consensus based risk allocation model is designed to shift parties' focus from percentages to hard dollars and to focus each defendant on its own pot rather than the other defendants'. This helps parties move from stalemate to progress.

The procedure is fairly straightforward. First comes preparation and diagnosis. I typically hold a initial joint session with all parties and one or more caucuses (private, confidential meetings with fewer than all parties). Because multi-defendant negotiations are cumbersome, plaintiffs often are surprisingly willing to share their more or less realistic, desired settlement number earlier on in the process, to enable the mediator to be effective. This is essential to the method's success. During the initial caucuses – first with the entire group of defendants and then with subgroups of defendants – the mutual finger pointing becomes apparent, producing its diagnosis. To address this problem, I hold a series of caucuses with each of the defendants. In each caucus I ask the same set of questions:

1. What is the likelihood the plaintiff will win at trial, and, if so, how much?
2. What percentage liability will be allocated to each defendant?
3. How much will it cost to try this case?

Answers to these questions are recorded on an Excel spreadsheet, with a horizontal row for each defendant's answer and a vertical column for each defendant discussed. Examples of these spreadsheet templates are presented in tables 1, 2, and 3, below. Question "1" is developed a bit further, to account for any comparative share allocated to a successful plaintiff. A final row is added to take the averages of the input from all defendants.

Table 1

	% Chance Plaintiff Wins	**Damages**	**Plaintiff's Comparative Share**	**Resulting Case Value**
Party A				
Party B				
Party C				
Party D				
Party E				
Party F				
Party G				
Party H				
Party I				
Party J				
Average				

Table 2

	Percentage Allocations									
	Party A	Party B	Party C	Party D	Party E	Party F	Party G	Party H	Party I	Party J
Party A										
Party B										
Party C										
Party D										
Party E										
Party F										
Party G										
Party H										
Party I										
Party J										

Average										

Table 3

	Costs Through Trial
Party A	
Party B	
Party C	
Party D	
Party E	
Party F	
Party G	
Party H	
Party I	
Party J	
Average	

By the time this approach is used, there has been back and forth, in joint session and via initial caucuses, on all parties' views of the strengths and weaknesses of the case, addressing both liability and damages. Risk analysis, if needed to develop greater realism, can be performed before or in conjunction with the discussions in these caucuses. My general observation is that by the time we have gathered answers to the above three questions, the parties have reached a certain degree of realism, and have developed some trust in the process and in the mediator.

When the interviews have been completed, I develop three different types of "pots" or economic scenarios.

(1) **Trial Outcome & Transaction Costs**. Using the trial outcome predictions recorded on the Excel spreadsheet, I calculate the average of the amount the plaintiff is predicted to win. Thus, *e.g.*, if there are ten defendants, there will be ten educated guesses of damages at trial, which can be averaged. By luck of the draw, in most instances where I have used this there has been minimal doubt that Plaintiff will win, but exuberant disagreement on the allocation of responsibility among defendants. Therefore, in these scenarios, there is little need to apply a total loss risk factor to the averaged damages number. See, *e.g.*, the results reflected in Table 4, below.

Table 4

Assumption: Plaintiff Wins Every Time				
	Plaintiff Wins	**Damages**	**Plaintiff Share**	**Resulting Case Value**
Party A	1	$ 2,800,000.00	0.333333333	$ 1,866,666.67
Party B	1	$ 2,300,000.00	0.25	$ 1,725,000.00
Party C	1	$ 2,775,000.00	0.2	$ 2,220,000.00
Party D	1	$ 2,500,000.00	0.25	$ 1,875,000.00
Party E	1	$ 2,250,000.00	0.33	$ 1,507,500.00
Party F	1	$ 2,300,000.00	0.25	$ 1,725,000.00
Party G	1	$ 3,250,000.00	0.333333333	$ 2,166,666.67
Party H	1	$ 3,750,000.00	0.25	$ 2,812,500.00
Party I	1	$ 2,000,000.00	0.5	$ 1,000,000.00
Party J	1	$ 3,100,000.00	0	$ 3,100,000.00
Averages	**1**	**$ 2,702,500.00**	**0.269666667**	**$ 1,999,833.33**
			Case Value Rounded Up:	***$ 2,000,000.00***

In the above table, a "1" is assigned to the "Plaintiff Wins" column, serving as a 100% type multiple against the damages and any plaintiff's comparative liability share. If, however, there were a strongly perceived risk that the plaintiff will have an outright loss, that risk factor column can also be completed and averaged. The resultant average can be applied to the average damages number to produce the defendants' collective view on case value. An example of this additional calculation is displayed in Table 5, below.

Table 5

Assumption: Varying Views of Plaintiff's Likelihood of Getting Any Damages/Winning Anything				
	Plaintiff Wins	**Damages**	**Plaintiff Share**	**Resulting Case Value**
Party A	0.75	$ 2,800,000.00	0.333333333	$ 1,400,000.00
Party B	0.8	$ 2,300,000.00	0.25	$ 1,380,000.00
Party C	0.9	$ 2,775,000.00	0.2	$ 1,998,000.00
Party D	1	$ 2,500,000.00	0.25	$ 1,875,000.00
Party E	1	$ 2,250,000.00	0.33	$ 1,507,500.00
Party F	0.66	$ 2,300,000.00	0.25	$ 1,138,500.00
Party G	0.5	$ 3,250,000.00	0.333333333	$ 1,083,333.33
Party H	1	$ 3,750,000.00	0.25	$ 2,812,500.00
Party I	0.5	$ 2,000,000.00	0.5	$ 500,000.00
Party J	0.9	$ 3,100,000.00	0	$ 2,790,000.00
Averages	**0.801**	**$ 2,702,500.00**	**0.269666667**	**$ 1,648,483.33**

The net result, with either set of expectations on Plaintiff's likelihood of winning at trial, is the defendants' collective assessment of case value. By itself, this could be used as a framework for negotiations.

Beyond this, the predicted defense costs can also be calculated as in Table 6, below.

Table 6

	Costs Through Trial
Party A	$ 250,000.00
Party B	$ 200,000.00
Party C	$ 250,000.00
Party D	$ 200,000.00
Party E	$ 150,000.00
Party F	$ 175,000.00
Party G	$ 250,000.00
Party H	$ 250,000.00
Party I	$ 75,000.00
Party J	$ 250,000.00
Average	**$ 205,000.00**
Rounded Average:	***$ 200,000.00***

Signficantly, one might make the common observation that collective transaction costs outweigh the risk of loss at trial. These costs are properly cumulated (added) rather than averaged. When combined with Trial Outcome, they give us the collective sense of the combined exposure to damages and transaction costs. An example is shown below, in Table 7, positing the simplified case of all defendants' recognizing that plaintiff will win something at trial. Figures for this table are drawn from Tables 4 and 6, above.

Table 7

Assumption: Plaintiff Wins Every Time			
	Trial Outcome	**Costs through Trial**	**Combined Case Exposure**
Party A	$ 1,866,666.67	$ 250,000.00	$ 2,116,666.67
Party B	$ 1,725,000.00	$ 200,000.00	$ 1,925,000.00
Party C	$ 2,220,000.00	$ 250,000.00	$ 2,470,000.00
Party D	$ 1,875,000.00	$ 200,000.00	$ 2,075,000.00
Party E	$ 1,507,500.00	$ 150,000.00	$ 1,657,500.00
Party F	$ 1,725,000.00	$ 175,000.00	$ 1,900,000.00

Party G	$ 2,166,666.67	$ 250,000.00	$ 2,416,666.67
Party H	$ 2,812,500.00	$ 250,000.00	$ 3,062,500.00
Party I	$ 1,000,000.00	$ 75,000.00	$ 1,075,000.00
Party J	$ 3,100,000.00	$ 250,000.00	$ 3,350,000.00
Av/Total	**$ 1,999,833.33**	**$ 2,050,000.00**	**$ 4,049,833.33**

If there is any doubt about the candor of various defendants' own cost estimates, the costs can be averaged for use when discussing likely costs with a particular defendant. See, Table 6, above. There is also the more cumbersome approach of including costs for every defendant in the third question during the initial interviews of each defendant, and using those figures. This is typically unnecessary, but can be used to produce the numbers to fill in the "Costs Through Trial" column of Table 7, above.

With the development of the above numbers, the mediator is in a better position for discussing risk analysis and transaction cost analysis with any defendant.

(2) **Probable Settlement Number**. It also pays to make note of the amount the plaintiff needs to settle the case. The first set of numbers, on case outcome and transaction costs, can now be used to reassess the realism of the plaintiff's probable settlement number. Before holding further discussions with defendants, I might reengage the Plaintiff in an exploratory caucus to get a better sense of what is needed to settle the case. Of course, it is important to be careful not to disclose to the Plaintiff confidential information gathered in the defendant caucuses. Nevertheless, all of the information supports the development of an educated guess at a probable settlement number. For purposes of our examples, let us assume that the Plaintiff would settle the case for $1.5 million.[3]

(3) **Graduated, Lesser Offer Pots ("GLOP")**. The goal of the overall exercise is to arrive at a proposal that might work for all parties, and that will be perceived by the defendants as credible and savvy. The ADR community is well acquainted with the concepts of integrative bargaining and principled negotiation. Fisher, Ury and the Harvard Negotiation School have alerted us to the drawbacks of positional, as opposed to interest based, bargaining.[4] Nevertheless, it is typical of negotiations for cases of this sort to occur in stages, with a pattern of alternating decreasing demands and increasing

[3] While this is just a hypothetical, given the assumptions in Tables 4 – 6, this is not an unrealistic number. $1.5 million is 75% of the average projected case outcome where plaintiff wins every time ($2 million per Table 4), and is a lesser discount off of the projection where plaintiff is seen as having some risk of outright loss (approximately $1.65 million per Table 5). There are benefits in having present use of funds, as opposed to waiting for trial (although somewhat offset by New York's 9% judgment interest rate). There are also benefits to plaintiff's counsel, often operating on a contingent fee, in spending less time on the case, avoiding outlay of expenses on experts and other litigation related costs, and in trading an uncertain win after trial and possible appeal for the certainty of a settlement. Of course, we are assuming that the entire group of defendants has not radically underestimated realistic damages at trial. Use of risk analysis in the caucuses where this information is gathered can help with quality control for these figures.

[4] *See, e.g.*, R. Fisher & W. Ury, Getting to Yes.

offers. Thus, it is wise for the mediator to develop two or more smaller numbers, one smaller than the next, that can be used as initial and subsequent offers to the Plaintiff on behalf of all defendants. Developing these numbers will enhance the overall credibility with defendants of the mediator's message and approach. For purposes of our example, where $1.5 million is the projected settlement pot, let us call the smallest GLOP $1 million and the next GLOP $1.25 million.[5]

Individual Defendant's Shares. Next it is time to develop each defendant's share of the settlement pot. Using the information gathered on the Excel spreadsheet, the mediator now derives the average of all defendants' views concerning each defendant's relative liability. An example of this approach can be seen in Table 8, below.

Table 8

	Percentage Allocations										
	Party A	Party B	Party C	Party D	Party E	Party F	Party G	Party H	Party I	Party J	**Total Percentage**
Party A	0.2	0.25	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1
Party B	0.3	0.15	0.2	0.1	0.1	0.05	0.025	0.05	0	0.025	1
Party C	0.35	0.25	0.1	0.075	0.1	0	0.05	0.025	0.025	0.025	1
Party D	0.2	0.2	0.15	0.1	0.1	0.1	0.05	0.05	0.025	0.025	1
Party E	0.2	0.15	0.2	0.125	0.1	0.05	0.075	0.075	0.025	0	1
Party F	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1
Party G	0.25	0.25	0.1	0.125	0.075	0.05	0.025	0.05	0.025	0.05	1
Party H	0.2	0.15	0.2	0.075	0.125	0.05	0.075	0.05	0.05	0.025	1
Party I	0.3	0.2	0.1	0.1	0.1	0.05	0.05	0.05	0	0.05	1
Party J	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.05	0	1
Average	**0.25**	**0.2**	**0.15**	**0.1**	**0.1**	**0.05**	**0.05**	**0.05**	**0.025**	**0.025**	**1**

The averages for each defendant are shown in the bottom row. The right hand column may be used as a check, to be sure that the percentages are correct. The total of all percentages should be 100%, shown as a "1" in that column. Any comparative share for

[5] As with the observations in Footnote 3, *supra*, associated with the Probable Settlement Number, one might keep in mind that GLOPs of $1 million and $1.25 million are made in the context of a $2 million projected trial outcome (Table 4, where Plaintiff always wins something) or $1.65 million projected trial outcome (Table 5, where Plaintiff is assumed to have some risk of outright loss). These GLOPs represent at the low end 50% of the Table 4 risk, and a lesser discount off the Table 5 risk. They nevertheless, provide encouragement to the Plaintiff with a seven figure starting offer. As comfort to Defendants, they still represent about only 25% of the Defendants' Combined Case Exposure ($4 million per Table 7). It is interesting to observe how factoring in transaction costs widens the zone of savings realized by Defendants and theoretically should encourage them to sweeten the pot for Plaintiffs, coming closer to Plaintiff's projected trial outcome. Steve Hochman refers to this effect as the "win/win range."

the plaintiff has already been worked into the Trial Outcome, Projected Settlement pot and GLOP numbers described above.

As mentioned above, it is important to move the defendants away from thinking in terms of percentages to thinking in terms of their own dollars. Thus, once each defendant's percentage has been obtained, the mediator can create different charts on the Excel Spreadsheet for each of the three sets of numbers[6] described above. Let us look, for example, at a chart applying each defendant's percentage to the Trial Outcome number. We can posit a trial outcome of $2 million and ten defendants collectively assessed to bear the proportionate shares reflected in the averages in Table 8, *i.e.* : 25%, 20%, 15%, 10%, 10%, 5%, 5%, 5%, 2.5%, and 2.5%. Under that scenario, the dollar allocations would be as shown in Table 9, below.

Table 9

	Trial Outcome
Party A	$ 500,000.00
Party B	$ 400,000.00
Party C	$ 300,000.00
Party D	$ 200,000.00
Party E	$ 200,000.00
Party F	$ 100,000.00
Party G	$ 100,000.00
Party H	$ 100,000.00
Party I	$ 50,000.00
Party J	$ 50,000.00
TOTALS:	**$ 2,000,000.00**

Application of a defendant specific transaction cost figure would add that defendant's acknowledged defense costs to that Defendant's Trial Outcome number. So, for example, a defendant with a $500,000 trial outcome allocation and a projected $250,000 transaction cost would be assigned a combined projected risk and transaction cost figure of $750,000. Applying the allocation percentages shown in Table 8 to the costs recorded in Table 6 and the presumed trial outcome quantified in dollars in Table 9 produces the total per defendant case exposure figures shown in Table 10 below.

Table 10

	Trial Outcome & Costs
Party A	$ 750,000.00
Party B	$ 600,000.00

[6] The three sets of numbers are Trial Outcome, Projected Settlement, and GLOP.

Party C	$	550,000.00
Party D	$	400,000.00
Party E	$	350,000.00
Party F	$	275,000.00
Party G	$	350,000.00
Party H	$	350,000.00
Party I	$	125,000.00
Party J	$	300,000.00
TOTALS:	**$**	**4,050,000.00**

Again, if the defendant's acknowledged defense cost seems off, an adjacent column could display the sum of that defendant's projected share of trial outcome and average defense costs. Thus, if average defense costs were $400,000, the number for Party A, above, would be $900,000.

There is no need at this stage to add general risk factors. Any meaningful risk factor for the Plaintiff should have been worked into the calculation of the Plaintiff's projected Trial Outcome. Risk factors relating to a given Defendant's liability should already have been worked into the derivation of that Defendant's percentage share. There is a separate question on "spin." What does the mediator do with the old fashioned hardball negotiator, the consummate low profile liability ducker, the outright spinmeister? The mediator has some choices here. One is simply to let the numbers do their magic. The greater the number of defendants, the lower the impact of one defendant's outrageous denial of obvious risk. Take for example, a defendant with an objective risk of 25% liability – let us call that defendant "HN," for hardball negotiator. If there are twenty defendants and each assesses HN's liability at 25%, but HN assesses its own liability at 5%, the average of the 20 estimates would be 24%, a modest adjustment. *See*, Table 11, below.

Table 11

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Party F	0.25

Party G	0.25
Party H	0.25
Party I	0.25
Party J	0.25
Party K	0.25
Party L	0.25
Party M	0.25
Party N	0.25
Party O	0.25
Party P	0.25
Party Q	0.25
Party R	0.25
Party S	0.25
Party T	0.25
Average	**0.24**

Of course, if there were just ten defendants, the average would permit somewhat greater skew. Nevertheless, even with ten defendants, the variance would be just two percentage points, with an average of 23%. See, Table 12, below.

Table 12

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Party F	0.25
Party G	0.25
Party H	0.25
Party I	0.25
Party J	0.25
Average	**0.23**

At a certain point – say, with five defendants, where the average would be 21% (*see* Table 13, below) – the variance might grow intolerable.

Table 13

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Average	**0.21**

This leads to the question of whether the mediator might make a separate "spinmeister" adjustment. An adjustment of this sort raises all sorts of ethical questions, of course.[7] But, before making any such adjustment, it pays to be aware of other social phenomena. First, there is the age old observation that force begets counterforce. Sometimes, precisely because of his hardball tactics, the hardball negotiator incurs the suspicion and ire of other defendants. This might be reflected in their assessment of that defendant's risk. Of course, if this goes overboard, there is the question of whether a countervailing adjustment is needed. In addition, there is a host of different negotiator personalities involved in any multi-defendant case. There might be one defendant/representative who understands that it objectively bears the lion's share of the risk. This defendant might be eager to resolve the matter. As a consequence, it might be willing to take on even a modest increase in its own portion, to be sure that the case settles. That defendant's representative, and others, might be well aware of the hardball curmudgeon and be openly willing to adjust rather than let HN gum up the works. It is helpful to keep in mind throughout these reflections the difference between the Trial Outcome share and the share that includes transaction costs. There is typically a good amount of "fat" created by the combined share, which can help justify either an adjustment or failure to make an adjustment.

It grows clear that the issue of whether, and, if so, how, to make adjustments is a tricky one. The ideal approach is to make no adjustments, or to engage in adjustments as much as possible at the front end, in the initial caucus with each defendant. If adjustments are made, I would feel an obligation to disclose that adjustments of that kind

[7] These questions, relating to candor, transparency, quality of the process, long term impact on repeat users of the mediator and on the mediator him or herself, the mediator's role, inter-party fairness, and other issues might be reserved for another article or for a forum discussion.

were made when explaining the consensus based risk allocation model and its results to all defendants.[8]

Returning to our numbers, just as percentages are applied to the Trial Outcome numbers, so too percentages are applied to the other two sets of numbers – the Proposed Settlement Number and the GLOP. Typically, we copy and paste the first chart and then substitute in the alternative assumption – Proposed Settlement Number or GLOP – which, thanks to the magic of Excel, changes the balance of the numbers for each Defendant's share. The results are displayed in Table 14, below.

Table 14

	Trial Outcome	Trial Outcome & Costs	Projected Settlement	Smallest GLOP	Largest GLOP
Party A	$ 500,000.00	750,000.00	375,000.00	250,000.00	$ 312,500.00
Party B	$ 400,000.00	600,000.00	300,000.00	200,000.00	$ 250,000.00
Party C	$ 300,000.00	550,000.00	225,000.00	150,000.00	$ 187,500.00
Party D	$ 200,000.00	400,000.00	150,000.00	100,000.00	$ 125,000.00
Party E	$ 200,000.00	350,000.00	150,000.00	100,000.00	$ 125,000.00
Party F	$ 100,000.00	275,000.00	75,000.00	50,000.00	$ 62,500.00
Party G	$ 100,000.00	350,000.00	75,000.00	50,000.00	$ 62,500.00
Party H	$ 100,000.00	350,000.00	75,000.00	50,000.00	$ 62,500.00
Party I	$ 50,000.00	125,000.00	37,500.00	25,000.00	$ 31,250.00
Party J	$ 50,000.00	300,000.00	37,500.00	25,000.00	$ 31,250.00
TOTALS:	**$ 2,000,000.00**	**4,050,000.00**	**1,500,000.00**	**1,000,000.00**	**$ 1,250,000.00**

The Joint Defendants Conference Call.

[8] To the extent a mediator thinks of making adjustments, a result oriented approach might include the pragmatic consideration of whether the dollar figures for each of the defendants can be obtained from that defendant. This can integrate financial capacity, intransigence, bargaining style, and all sorts of *real politik* factors. Again, it would be ideal to make no adjustment, in order to maintain the purity of the model and lessen the predictable gamesmanship that might ensue after the necessary disclosure of the mediator's methodology.

Once all numbers are worked out,[9] I typically hold a joint conference call with all defense counsel. I explain what I did and ask whether the Defendants would like to hear the outcome of this experiment. Invariably, all are eager to hear the results. It is important to explain that the settlement assessment and each of the proposed defendants' shares are the result of a collective effort. With their agreement, I let defendants know what the collective proposed settlement pot is, as well as what two or more lesser pots (the GLOP) would be. I then give them the dollar share (not percentages) for each defendant contributing to the pot in question. One variation of this approach is simply to present the lowest pot, and explain that, while this is not expected to settle the case, it seems like a good start. In all instances, where there is no "spinmeister adjustment," it is important to highlight that the numbers are entirely a pass through of the defendant's best estimates. Any adjustment would pose a test of the mediator's tact to communicate this without upsetting the apple cart. Defendants can be told that this is essentially the result of their estimates but that the mediator might have made a "tweak" here or there in order to obtain a workable package. This balance of transparency and obscurity is an art that actually generates approval and greater acceptance of the result.

Seeking permission is key to obtaining Defendants' buy in. Beyond this, it is required since the proposed numbers will be presented as the collective result of confidential caucuses, and thus are based upon confidential information. Not surprisingly, the defendants have consistently expressed unanimous interest in the outcome.

Typically, defense counsel return to their carriers or clients with a report on this unusual conference call. I will follow up with each of them by phone caucuses, or might simply get an email approving of a defendant's share. More often than not, the vast majority of defendants return with approval. At times, there might be a need for further adjustment of one or more shares. This can involve some telephone caucusing and, perhaps, some horse trading with the help of one or more parties who, for one reason or another,[10] have some additional flexibility.

In sum, I deliver to the defendants three packages for presentation to the plaintiff – an initial, a subsequent, and a final pot – identifying, by dollar figure only, each defendant's contribution to each of these three pots. A doable settlement path appears in place of what had been a field of warring soldiers. Through channeling Defendants' own information into reasonable grids, the consensus based risk allocation model can create productive order out of the chaos of multi-party bargaining sessions.

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[9] Depending on the circumstances, parties and the numbers involved, "working out the numbers" might also involved making caucus calls to specific defendants to test the waters on the numbers that will be appearing for that defendant in the Proposed Settlement Number and GLOP charts.

[10] Reasons for flexibility could include that they have assessed their risk as worse than the collective number would suggest, that their combined risk and transaction cost well exceed the proposed number, that they have greater distance and recognize one or more recalcitrant parties as potentially holding up a good settlement or as possibly having even less risk than has been assessed for them.

***Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), was the first Chair of NYSBA's Dispute Resolution Section. Mr. Baum has mediated over 900 disputes, including the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine's 2005 - 2011 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011. He teaches Negotiation Theory & Skills at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR, For over a decade he has trained mediators for the Commercial Division of various counties of the New York Supreme Court, and more recently through the NYSBA's Dispute Resolution Section.*

TAB 4

The Technique of No Technique: A Paean to the *Tao te Ching* and Penultimate Word on Breaking Impasse

By: Simeon H. Baum**

Mediators and ADR aficionados love to discuss impasse. Transformative mediators remind us that fostering party empowerment and recognition – not settlement or problem solving – should be the mediator's driving purpose.[1] Still, we confess that for many of us impasse remains a bugaboo. Those of us who seek to maintain and generate "constructive" discussion, and even problem solving, in a mediation aptly value the treasure trove of techniques and suggestions that can be found in a book like this one.

While recognizing the value of these suggested "how tos", a compendium of impasse breakers for mediation is well served by a final corrective: the technique of no technique. About a dozen years ago, this author moderated a program on *Impasse Breaking* hosted by the New York County Lawyers Association. That night, four excellent, experienced mediators presented one technique a piece.

Professor Lela Love suggested that when the parties are snagged on one issue, the mediator can change the agenda. The parties can "pin" the frustrating issue for the time being, lifting a phrase from the entertainment industry, and shift to another potentially more workable issue. With a history of success behind them, they can later return to the troubling issue if, in fact, it has not dissolved or morphed into a more easily resolvable form.

Margaret Shaw suggested applying standards coupled with a transaction cost analysis. In her example, drawn from the employment context, one could derive a back pay number from considering the standard that would be applied by a court, and then compare it to the cost of litigation (which might be even greater).

Hon. Kathy Roberts suggested use of the "mediator's proposal." While Steve Hochman develops this concept in his article within this compendium, Judge Roberts differed from Steve's approach by selecting "doability" as the standard for her proposal – is it likely to settle the case? – rather than fairness or predicted case outcome. This proposal generated very interesting debate with Professor Love on whether use of a mediator's proposal distorts the mediation process. There were multiple concerns. First, Professor Love questioned whether it is even the mediator's role to provide evaluative feedback or direction to the degree reflected in the mediator's proposal. Moreover, where parties have been encouraged to be candid, exposing case weaknesses and settlement thoughts in caucus, there is a question of whether they might regret that candor if it were now factored into an endgame solution. Conversely, if parties anticipate that there will be a "mediator's proposal," there might be excessive emphasis on spinning the mediator – whether it is with their thoughts on what might settle the case (in the doability

[1] *See, e.g.*, Robert A. Baruch Bush and Joseph P. Folger, The Promise of Mediation – Responding to Conflict Through Empowerment and Recognition (Josey Bass, 1994), which sets out this transformative manifesto.

model) or their thoughts on legal risks (in a case outcome or fairness model). Over time, its use could stifle candor and creativity. Overall, there is a risk that mediation would shift from a party-centric to a mediator-centric one. Rather than fostering party empowerment and recognition, or joint, mutual gains problem solving, using the mediator's proposal as the cherry on top of the ice cream Sunday threatens to convert that open, fluid, meaningful, and enriching process into an alter ego of Court or settlement conferences, where the mediator and not the parties is the star of the show.

Roger Deitz suggested use of a "ball and chain." He advises parties at the commencement of the mediation that there might come a time when they wish to leave the mediation. He extracts, *ab initio*, a commitment from each party that if that time arises, he or she will stay if so requested by the mediator. Considering that one of the most valuable services rendered by the mediator is keeping people at the table, this is a valuable thought indeed.

At some point that evening, I had the opportunity to suggest the approach I raise here, terming it the "technique of no technique." The core point was the observation that the greatest value a mediator brings to the table is not a set of skills or a bag of tricks. Rather, it is the character of the mediator, and particularly the ability to communicate and engender trust. Cultivation of trust goes beyond the vital trust in the mediator to encouraging the development of trust among the participants. Essential to this is the mediator's presence. This is a quality of open awareness that is expressed in all conceivable ways. It is not simply what the mediator says or does. It includes posture, bearing, tone of voice, eye contact, and the power of omission. It involves a sensitive awareness, deep listening, flexibility, and a genuine quality of connectedness or relatedness. The mediator models a mode of being with the parties that implicitly communicates a message. The silent message is: we are all decent, capable people of good will who are all in this world together, and can work through this problem together. Underpinning this message is the sense that there is a force in and embracing us that will work it out, if we persist and let it happen.

Now, this might sound a bit vague, or even otherworldly. But the power of attitude cannot be overrated. This intuition finds support in recent studies by Margaret Shaw and Steven Goldberg. Both in a study they did in 2007 polling users of mediators with no judicial background and in a more recent study with Jeane M. Brett, including user of former judge mediators, they received responses from hundreds of lawyers on what made the mediator effective in moving a matter to resolution. The researchers grouped answers into three broad categories: (1) confidence-building skills (the ability to gain the trust and confidence of the parties), (2) evaluative skills (the ability to encourage agreement by evaluating a party's likelihood of achieving its goals in court or arbitration), and (3) process skills (skills by which a mediator seeks to encourage agreement, not including evaluative skills). By far, the greatest source of success of was confidence building skills, with 60% of the responses identifying this quality. This was

followed by process skills (35%) including patience and perseverance, with evaluative skills being the least significant (33%).[2]

A core takeaway from the Shaw, Goldberg studies is that trust and confidence is key to success in mediation. The highlighted attributes of what build trust and confidence relate to character and attitude: "Friendly, empathetic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions"; "High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional." There are many traits and acts that can be identified. Yet, central to all, I would submit, is the fundamental attitude – call it the mediator spirit – described above, before our mention of this study. The point of using this type of term is to emphasize that there is something whole, something integrative, something at the heart of the mediator that cannot be divided, manipulated, juggled and parsed – a gestalt, to borrow from Fritz Perls[3] – that is essential to the mediator's power. That power, of course is the special power that comes precisely from powerlessness. In place of judicial or other form of authority, might or coercive force, is the quality of the mediator that fills this void. That is a power of trust. Trusting and trustworthiness, cultivating trust in others. An attitude that values freedom and recognizes that the parties themselves are the valued decision makers. It is a letting go that brings with it the embrace of the whole.

The aspect of the mediator highlighted here affects atmospherics. It does not have to be showy (hopefully it is not!). But it makes a major difference in keeping people in the room. It supports communication and creativity. It communicates positive regard for the participants, reinforcing their willingness to continue with what can be a difficult discussion.

A central point of the "technique of no technique" is not that the various approaches and methods are not valuable. They certainly are. Still, there is something perhaps more essential. There is a time honored term drawn from China, *wu wei*, which can be translated as "non-doing." This loaded term can be found in the 2,500 year old classic, the *Tao te Ching*. If there is any text which could serve as the mediator's bible, my vote would be for this one. Attributed to Lao Tsu, there are hundreds of English language translations of this seminal text in the Taoist tradition.[4] Discussing the meaning and philosophy of the *Tao te Ching* and its application to mediation is a major topic that could support a book, and is beyond the scope of this addendum. Moreover, there is certainly no intent here to persuade readers that one must adhere to a particular religious or cultural tradition in order to be an effective mediator. But, in *wu wei*, the Taoists

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[2] Stephen B. Goldberg and Margaret L. Shaw, *The Secrets of Successful and Unsuccessful Mediators Continued: Studies Two and Three*, 23 Negotiation Journal 4, pages 393-418 (October 2007). Confidence Building Attributes included interpersonal skills of empathy, friendliness, caring, respect, trustworthiness, integrity, intelligence, the readiness to find solutions that comes with obvious preparation. Process skills included patience and persistence, good listening, and dkplomatic tact.

[3] *See, e.g.*, Perls, F., Hefferline, R., & Goodman, P., *Gestalt Therapy: Excitement and Growth in the Human Personality* (1951).

[4] Two lovely translations of the Tao te Ching are: Stephen Mitchell, Tao te Ching (Harper & Row 1988)(with broad poetic license) and Wing-Tsit Chan, The Way of Lao Tsu (Tao-te ching) (Prentice Hall; First edition. Fifth printing. edition (January 11, 1963)).

supply us with a very useful and suggestive concept.[5] One insight of *wu wei*, is that sometimes one makes greater progress by not interfering with the activities of others. Rather, letting a course of events develop on its own, as it were, with patience, confidence, and open, accepting attention, can permit the being or event to develop as it should. *Wu wei* suggests stepping out of the way, rather than directing, controlling and manipulating events. To draw on an overused term, it suggests a holistic approach, where the mediator recognizes that larger forces are at play and permits, encourages or assists in their constructive movement.

There are many practical applications of "not doing" with which we are all familiar. We all know that sometimes it makes sense to hold one's tongue. We all have experienced moments when, by letting someone struggle with a problem, we permit them to arrive at a solution which our intermeddling might have blocked. Our silence can permit a truthful expression or insight from developing in a dialogue that our speech might have stifled. Tact is based on non-doing.

In negotiation, the negotiators have an inner drive towards resolution. They want a solution that will meet their needs. They have their own fears and concerns about legal outcomes. Moreover, extrinsic forces and circumstances support resolution. Costs continue to mount. All the forces of the business, legal, and broader community continue to operate and impinge on the players. Time ticks away. These things are already operating without our encouragement. Non-doing simply helps them find a way of expression, of recognition, and then of choices to take action to dissipate concerns and satisfy needs, to limit risks and reduce costs which no rational or even emotional actor genuinely wants to incur.

The preceding examples are just a fraction of the meanings which can be drawn from *wu wei*. A classic image from the *Tao te Ching* is water. It moves without effort or conscious force, finding the low places, from shape of terrain and force of gravity. The mediator's presence can similarly have influence, without any particular effort on the mediator's part. A handshake, a smile, a nod. We can point to these things and note what a difference they might make in reducing the interpersonal temperature in a room. Yet often, like leaves falling in autumn, they are simply a natural consequence of the mediator's overall character and nature – a character that is supported by disciplined self consciousness.

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[5] At least ten of the 81 chapters (or quatrains) of the Tao te Ching specifically recommend or observe the benefits of *wu wei*. *See*, W.T. Chan, The Way of Lao Tsu (Tao-te Ching), chapters 2, 3, 10, 37, 38, 43, 48, 57, 63 and 64. *Wu wei* involves action so integrated with larger reality that the actor is more like one participating in a dance to a universal tune. This actor does not claim credit (Ch. 2), and effectively lets things happen without imposing his will on them or taking possession of them (Ch. 10). This actor does not rely on her own ability (Ch. 2) and has a quality of tranquility (Ch. 57), simplicity (Ch. 48, 57), and softness (Ch. 38): "The softest things in the world overcome the hardest things in the world. Non-being penetrates that in which there is no space. Through this I know the advantage of *taking no action*." Some clues to *wu wei* are found in recommendations to pursue a "stitch in nine" philosophy – dealing with problems before they become too large – and fractionation – breaking down big problems into more workable component parts (Ch. 63, 64). The approach of *wu wei* implies a profound discernment of the power of spontaneous transformation (Ch. 37). To proceed with *wu wei* is to proceed with no *a priori* plan or purpose, and, at a minimum with a high degree of flexibility, sensitivity and adaptiveness.

Continuing with the Taoist theme, while we are at it, we can take another example from *tai chi*, a martial art, itself, imbued with the philosophy found in the Tao te Ching. We have seen tai chi players in the park, with flowing, continuous, graceful movements. One component of that martial arts practice is "push hands." Push hands involves two players standing facing each other. As party A places his hands on the other's arm, party B senses the force. As party A presses, party B shifts direction and recedes, so that at no time does he confront or oppose party A's force. Party B, in turn shifts to press party A, who likewise shifts direction and recedes. The main objective in the execution of the four simple push hands moves of "ward off, rollback, press and push" is for the players to maintain contact throughout, forming a harmonious whole, with no more than 4 ounces of pressure building up at any time. While this practice can be used as a model of non-confrontation, the most significant point to be derived here is of continuous relatedness or connection.

Like a push hands player, the mediator preserves a gentle connection with all participants through the mediator's presence and broad, affirming awareness. The importance of this presence to preserving continuity of constructive dialogue cannot be underestimated. Just as, when things get knotty in push hands, the skilled player neither breaks away nor erupts with force, but maintains sensitivity and lets the form work itself out, so too, the mediator neither breaks off the session, nor necessarily rushes to caucus, nor desperately argues the parties into doing something. Most effective is gently remaining present, perhaps just waiting, listening deeply, and sensing what is happening, what perhaps is driving this interaction, while also seeing the broader context.[6]

In one employment mediation, conducted a decade ago, an attorney complained that "the mediator did nothing; we settled it ourselves." Assuming the mediator was there throughout and supported continuing talks, staying out of the parties' way, this, too, is non-doing. It is well beyond the role of simple message bearer. One quotation from Stephen Mitchell's translation of the Tao te Ching is apt here:

> When the Master governs, the people
> are hardly aware that he exists.
> Next best is a leader who is loved.
> Next, one who is feared.
> The worst is one who is despised.
>
> If you don't trust the people,
> you make them untrustworthy.
>
> The Master doesn't talk, he acts.

[6] With apologies to transformatives who assert that a mediator should maintain a microfocus – not seeking the "big picture – this statement is made with a recognition that both ends of the microscope and telescope may revealing an opening to something that can move people from the snag of apparent impasse. But living with the impasse is the heart of non doing. To quote mediator Barry Berkman (of the Himmelstein Friedman school), it is the "paradoxical nature of change" that change can develop when we recognize and accept the reality of a given situation – even of one that seems undesirable.

When his work is done,
the people say, "Amazing:
we did it, all by ourselves!"[7]

Recently, Gerald Lepp, ADR Administrator for the mediation panel of the United States District Court for the Eastern District of New York, held an "ADR Cross Cultural Workshop" structured and facilitated by Hal Abramson of Touro Law School, with Dina Jansenson and Jeremy Lack as panelists. Professor Abramson presented a number of scenarios depicting cross cultural misunderstandings and elicited suggestions from the audience/participants on how to correct them. At the end of this session, Dina Jansenson wisely observed that most of the time in mediation, the mediator will, appropriately, do nothing more than be aware of the dynamic.

There is much to be said for recognizing that often, less is more. We do not have to fix everything. Beyond this, silence itself is a tremendous force. As noted above, refraining from filling the void is often the greatest wisdom. It leaves space for meaning, creativity, and a host of valuable and significant expressions to emerge.

Professor Len Riskin made a splash in the mediation field in the mid 1990s with his seminal article, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*.[8] "Riskin's Grid," which created a typology of mediators ranging from evaluative and directive to facilitative, and from narrowly to broadly focused ones, fostered great debate on whether it was within the mediator's purview to conduct evaluations or direct parties at all.[9] Since 2002, Riskin has embarked upon another groundbreaking path within the legal and ADR field: promoting mindfulness meditation.[10] Drawing on Buddhist Vipasana teachings, Riskin observes that disciplined practice of awareness of one's breathing, and of one's physical, emotional and mental

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[7] S. Mitchell, Tao te Ching, Ch. 17. Here is Wing Tsit Chan's translation:

> The best (rulers) are those whose existence is (merely) known by the people. The next best are those who are loved and praised. The next are those who are feared. And the next are those who are despised.
>
> It is only when one does not have enough faith in others that others will have no faith in him. (The great rulers) value their words highly. They accomplish their task; they complete their work. Nevertheless their people say that they simply follow Nature.

Wing-Tsit Chan, The Way of Lao Tsu (Tao-te ching), Ch. 17. Although both versions of Chapter 17 speak of the ruler's acting, it is noteworthy that this is seen as others doing it themselves or the ruler's just following Nature. *Cf.* citations in footnote 4, *supra*.

[8] 1 Harv. Negot. L. Rev. 7 (1996).

[9] *See, e.g.*, Lela Love and Kim Kovach, *"Evaluative" Mediation Is an Oxymoron*, 14 Alternatives To High Cost Litig. 31 (1996); Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937 (1997). Riskin's 1997 poetic rejoinder can be found online at: http://www.law.fsu.edu/journals/lawreview/downloads/244/riskin.pdf.

[10] *See, e.g.*, Leonard I. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 Harvard Negotiation Law Review 1 (2002); Leonard. I. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 Journal of Legal Education 79 (2004); Leonard. I. Riskin, *Knowing Yourself: Mindfulness*, The Negotiator's Fieldbook – The Desk Reference for the Experienced Negotiator (A.K. Schneider, C Honeyman, Ed.) (ABA Section of Dispute Resolution 2006).

states, can increase relaxation, calm, alertness, and sensitivity to others. He suggests that this can enhance the humane practice of the law and of dispute resolution.

Interestingly, I remember twenty years ago reading about a Zen master who mediated a deadly dispute between warlords in medieval Japan. He remained calm, gave recognition to each party, identified interests, promoted a resolution that permitted the saving of face, and was detached from identifying with one side or the other. While, unfortunately, I have not been able to recover this reference, I recall that it struck me at the time as not insignificant that the practice of meditation supported this function. Profound awareness of self enhances calm and deep awareness of others. That, in turn, supports connection and presence.

The "technique of no technique" includes the suggestion that mediators not be stuck on any one technique or approach. In the ABA Dispute Resolution's "Negotiator's Fieldbook," Peter S. Adler exhorts negotiators not get boxed into a single type defined by two pairs of opposites – moral or pragmatic, competitive or cooperative – but rather, remain flexible: the Protean negotiator. The same recommendation applies to mediators facing impasse. Definitely, we should peruse our bag of tricks. But, whatever our preferred strategy, style, or approach, we might be alert to the possibility that it makes sense, under the circumstances to break the rules. Even the attentive, trust generating, integral, flexible, supportive mediator – who modulates presence and relatedness -- ought to be ready, at times to try one of the approaches recommended in this compendium.

***Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), was the first Chair of NYSBA's Dispute Resolution Section. Mr. Baum has mediated over 900 disputes, including the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine's 2005 - 2011 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011. He teaches Negotiation Theory & Skills at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.*

TAB 5

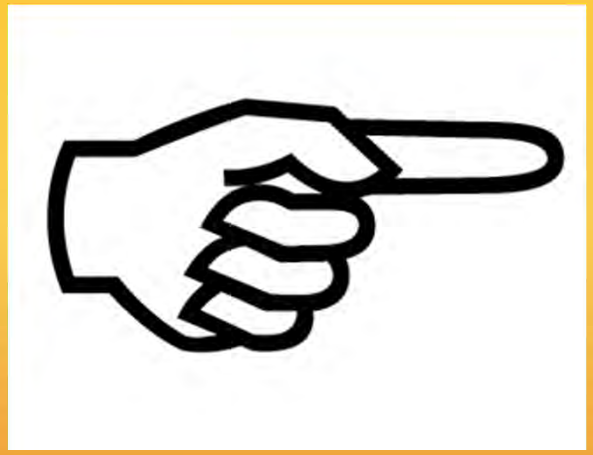
United States Eastern District of New York Alternative Dispute Resolution Dept. Summer Luncheon 2011

Sausage Making Laid Bare –

The Consensus Based Risk Allocation Model & Other Approaches to Multiparty Naysayers

Simeon H. Baum, Esq., Resolve Mediation Services, Inc., New York, NY (212) 355-6527 www.mediators.com

Mutual Finger Pointing in the Multi-Party Case



- Denial of Fault
- Obsession with Percentage Share
- Refusal to Pay More than X%
- Insistence that other Party Must Pay Y%
- Will pay up to X% if other Party Pays At Least Y%

Go with the Flow

- Give the Parties What They Want – Opportunity to Express Their Views, Needs & Assessments
- Rather than Oppose, Use This Information
- Rather than Impose (Mediator's View) Develop Consensus Based Risk & Case Value Assessment
- Ultimately, with Parties' Permission, this can be used to Resolve Case

Poll the Parties

- What is the likelihood the Plaintiff will win at trial, and, if so, how much?
- What percentage liability will be allocated to each Defendant?
- How much will it cost to try this case?

Take Notes

	% Chance Plaintiff Wins	**Damages**	**Plaintiff's Comparative Share**	**Resulting Case Value**
Party A				
Party B				
Party C				
Party D				
Party E				
Party F				
Party G				
Party H				
Party I				
Party J				
Average				

	Percentage Allocations									
	Party A	Party B	Party C	Party D	Party E	Party F	Party G	Party H	Party I	Party J
Party A										
Party B										
Party C										
Party D										
Party E										
Party F										
Party G										
Party H										
Party I										
Party J										
Average										

	Costs Through Trial
Party A	
Party B	
Party C	
Party D	
Party E	
Party F	
Party G	
Party H	
Party I	
Party J	
Average	

Develop Three (3) Pots

- Trial Outcome & Transaction Costs

- Probable Settlement Number

- Graduated Lesser Offer Pots (GLOP)

Trial Outcome & Transaction Costs

- A Collective, Predictive Exercise
- Aided By Risk & Transaction Cost Analysis

- Depends on Developing Trust in the Mediator & the Process

Assumption: Plaintiff Wins Every Time				
	Plaintiff Wins	**Damages**	**Plaintiff Share**	**Resulting Case Value**
Party A	1	$ 2,800,000.00	0.333333333	$ 1,866,666.67
Party B	1	$ 2,300,000.00	0.25	$ 1,725,000.00
Party C	1	$ 2,775,000.00	0.2	$ 2,220,000.00
Party D	1	$ 2,500,000.00	0.25	$ 1,875,000.00
Party E	1	$ 2,250,000.00	0.33	$ 1,507,500.00
Party F	1	$ 2,300,000.00	0.25	$ 1,725,000.00
Party G	1	$ 3,250,000.00	0.333333333	$ 2,166,666.67
Party H	1	$ 3,750,000.00	0.25	$ 2,812,500.00
Party I	1	$ 2,000,000.00	0.5	$ 1,000,000.00
Party J	1	$ 3,100,000.00	0	$ 3,100,000.00
Averages	**1**	**$ 2,702,500.00**	**0.269666667**	**$ 1,999,833.33**
			Case Value Rounded Up:	***$ 2,000,000.00***

Assumption: Varying Views of Plaintiff's Likelihood of Getting Any Damages/Winning Anything				
	Plaintiff Wins	**Damages**	**Plaintiff Share**	**Resulting Case Value**
Party A	0.75	$ 2,800,000.00	0.333333333	$ 1,400,000.00
Party B	0.8	$ 2,300,000.00	0.25	$ 1,380,000.00
Party C	0.9	$ 2,775,000.00	0.2	$ 1,998,000.00
Party D	1	$ 2,500,000.00	0.25	$ 1,875,000.00
Party E	1	$ 2,250,000.00	0.33	$ 1,507,500.00
Party F	0.66	$ 2,300,000.00	0.25	$ 1,138,500.00
Party G	0.5	$ 3,250,000.00	0.333333333	$ 1,083,333.33
Party H	1	$ 3,750,000.00	0.25	$ 2,812,500.00
Party I	0.5	$ 2,000,000.00	0.5	$ 500,000.00
Party J	0.9	$ 3,100,000.00	0	$ 2,790,000.00
Averages	**0.801**	**$ 2,702,500.00**	**0.269666667**	**$ 1,648,483.33**

	Costs Through Trial
Party A	$ 250,000.00
Party B	$ 200,000.00
Party C	$ 250,000.00
Party D	$ 200,000.00
Party E	$ 150,000.00
Party F	$ 175,000.00
Party G	$ 250,000.00
Party H	$ 250,000.00
Party I	$ 75,000.00
Party J	$ 250,000.00
Average	**$ 205,000.00**
Rounded Average:	***$ 200,000.00***

Assumption: Plaintiff Wins Every Time			
	Trial Outcome	**Costs through Trial**	**Combined Case Exposure**
Party A	$ 1,866,666.67	$ 250,000.00	$ 2,116,666.67
Party B	$ 1,725,000.00	$ 200,000.00	$ 1,925,000.00
Party C	$ 2,220,000.00	$ 250,000.00	$ 2,470,000.00
Party D	$ 1,875,000.00	$ 200,000.00	$ 2,075,000.00
Party E	$ 1,507,500.00	$ 150,000.00	$ 1,657,500.00
Party F	$ 1,725,000.00	$ 175,000.00	$ 1,900,000.00
Party G	$ 2,166,666.67	$ 250,000.00	$ 2,416,666.67
Party H	$ 2,812,500.00	$ 250,000.00	$ 3,062,500.00
Party I	$ 1,000,000.00	$ 75,000.00	$ 1,075,000.00
Party J	$ 3,100,000.00	$ 250,000.00	$ 3,350,000.00
Av/Total	**$ 1,999,833.33**	**$ 2,050,000.00**	**$ 4,049,833.33**

Divvy It Up

- Collective View of Percentages
- Overcoming Bias of Single Party with Law of Averages
- Overcoming Gamesmanship by Single Party

	Percentage Allocations										
	Party A	Party B	Party C	Party D	Party E	Party F	Party G	Party H	Party I	Party J	**Total Percentage**
Party A	0.2	0.25	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1
Party B	0.3	0.15	0.2	0.1	0.1	0.05	0.025	0.05	0	0.025	1
Party C	0.35	0.25	0.1	0.075	0.1	0	0.05	0.025	0.025	0.025	1
Party D	0.2	0.2	0.15	0.1	0.1	0.1	0.05	0.05	0.025	0.025	1
Party E	0.2	0.15	0.2	0.125	0.1	0.05	0.075	0.075	0.025	0	1
Party F	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.025	0.025	1
Party G	0.25	0.25	0.1	0.125	0.075	0.05	0.025	0.05	0.025	0.05	1
Party H	0.2	0.15	0.2	0.075	0.125	0.05	0.075	0.05	0.05	0.025	1
Party I	0.3	0.2	0.1	0.1	0.1	0.05	0.05	0.05	0	0.05	1
Party J	0.25	0.2	0.15	0.1	0.1	0.05	0.05	0.05	0.05	0	1
Average	**0.25**	**0.2**	**0.15**	**0.1**	**0.1**	**0.05**	**0.05**	**0.05**	**0.025**	**0.025**	**1**

Convert To $$$

- Move from Percentages
- Shift from Comparative/Relational Contribution Analysis
- Apply to Predicted Trial Outcome
- Apply to Combined Trial Outcome & Costs

	Trial Outcome
Party A	$ 500,000.00
Party B	$ 400,000.00
Party C	$ 300,000.00
Party D	$ 200,000.00
Party E	$ 200,000.00
Party F	$ 100,000.00
Party G	$ 100,000.00
Party H	$ 100,000.00
Party I	$ 50,000.00
Party J	$ 50,000.00
TOTALS:	**$ 2,000,000.00**

	Trial Outcome & Costs
Party A	$ 750,000.00
Party B	$ 600,000.00
Party C	$ 550,000.00
Party D	$ 400,000.00
Party E	$ 350,000.00
Party F	$ 275,000.00
Party G	$ 350,000.00
Party H	$ 350,000.00
Party I	$ 125,000.00
Party J	$ 300,000.00
TOTALS:	**$ 4,050,000.00**

Power of Numbers

- Collective Sense Overcomes Individual Party Skewing – Spinmeister, Hardball Negotiator, Low Profiler, Finger Pointer
- Tyranny of the Majority? The Target Defendant
- Finding “Fat”



	Percentage Allocations
	Party A (Hardball Negotiator)
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Party F	0.25
Party G	0.25
Party H	0.25
Party I	0.25
Party J	0.25
Party K	0.25
Party L	0.25
Party M	0.25
Party N	0.25
Party O	0.25
Party P	0.25
Party Q	0.25
Party R	0.25
Party S	0.25
Party T	0.25
Average	**0.24**

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Party F	0.25
Party G	0.25
Party H	0.25
Party I	0.25
Party J	0.25
Average	**0.23**

	Percentage Allocations
	HN
Party A (HN)	0.05
Party B	0.25
Party C	0.25
Party D	0.25
Party E	0.25
Average	**0.21**

Probable Settlement $$$

- Based on Conversations with Plaintiff
- Guided by Conversations with Defendants, Crystallized through Caucuses and Spreadsheets
- Can Be Seen As Percentage of Ave
  Trial Outcome & Transaction Co
- Interesting to Compare to Predicted, Averaged Trial Outcom

Graduated Lesser Offer Pots (GLOP)

- Permit Incremental Increases
- Made as Percentage of Predicted Settlement Pot
- Builds Trust with Defendants
- Creates Sense of Control
- Offers Stepped Approach to Gaining Contributions From Reluctant Defendants

	Trial Outcome	**Trial Outcome & Costs**	**Projected Settlement**	**Smallest GLOP**	**Largest GLOP**
Party A	$ 500,000.00	750,000.00	375,000.00	250,000.00	$ 312,500.00
Party B	$ 400,000.00	600,000.00	300,000.00	200,000.00	$ 250,000.00
Party C	$ 300,000.00	550,000.00	225,000.00	150,000.00	$ 187,500.00
Party D	$ 200,000.00	400,000.00	150,000.00	100,000.00	$ 125,000.00
Party E	$ 200,000.00	350,000.00	150,000.00	100,000.00	$ 125,000.00
Party F	$ 100,000.00	275,000.00	75,000.00	50,000.00	$ 62,500.00
Party G	$ 100,000.00	350,000.00	75,000.00	50,000.00	$ 62,500.00
Party H	$ 100,000.00	350,000.00	75,000.00	50,000.00	$ 62,500.00
Party I	$ 50,000.00	125,000.00	37,500.00	25,000.00	$ 31,250.00
Party J	$ 50,000.00	300,000.00	37,500.00	25,000.00	$ 31,250.00
TOTALS:	**$ 2,000,000.00**	**4,050,000.00**	**1,500,000.00**	**1,000,000.00**	**$ 1,250,000.00**

Joint Defendant Conference Call

- Explain Process
- Get Permission - Confidentiality
- Consensus Based Risk Allocation
- Questions on Mediator Adjustments
- Time for Consideration
- Telephone Caucuses
- Further Adjustments
- All At Once or Pot by Pot

OUT TAKES


SUN-MAID
RAISINS


WHOSE FAULT ?


NO U

TAB 6

United States Eastern District of New York
Alternative Dispute Resolution Dept.
Summer Luncheon 2011

The Technique of No Technique: A Paean to the *Tao te Ching* & Penultimate Word on Breaking Impasse

Simeon H. Baum, Esq., Resolve Mediation Services, Inc.,
New York, NY (212) 355-6527 www.mediators.com


IMPASSE
DU BOUT DU MONDE

Techniques for Breaking Impasse

- Lela Love – Change the Agenda
- Margaret Shaw – Standards Coupled with Transaction Cost Analysis
- Hon. Kathy Roberts – Mediator's Proposal
- Roger Deitz – Ball & Chain: Commitment to Stay when Asked to Stay

Technique of No Technique

- Character of the Mediator – Communicate & Engender Trust
- Presence
- Open Awareness
- Expressed in Posture, Bearing, Tone, Eye Contact, Omission
- Sensitive Awareness
- Deep Listening
- Flexibility
- Connectedness, Relatedness

Unspoken Message

- Decent, capable people of good will
- In this world together
- Greater force in and embracing us that will work it out if we persist and let it happen

M. Shaw & S. Goldberg Study

#1: Confidence Building Skills (60%)

#2: Process Skills (35%)

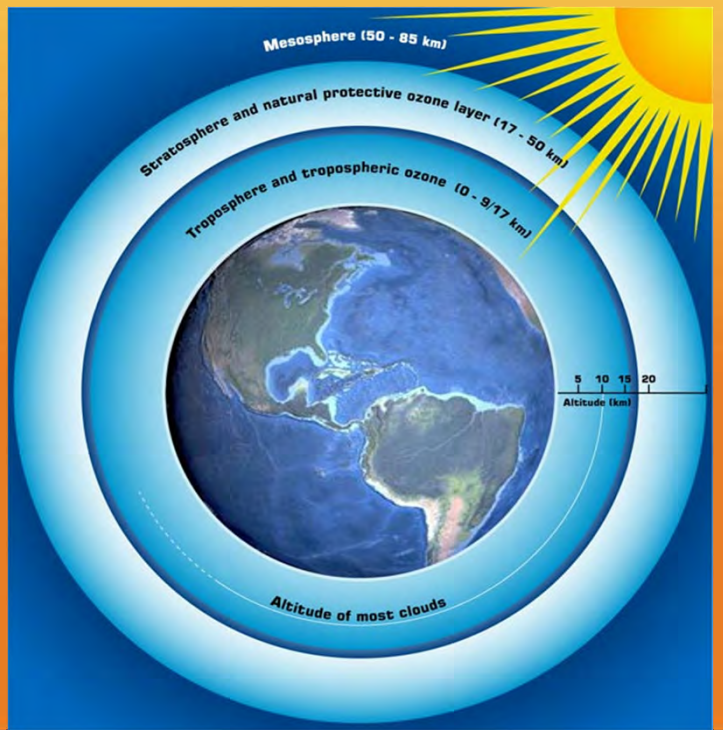
#3: Evaluative Skills (33%)

Confidence & Trust Building Skills

- Friendly, empathetic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions (60%)
- High Integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional (53%)
- Smart, quick study, educates self on dispute, prepared, knows K/law (47%)

Indivisible Character Affecting Atmospherics

- Gestalt
- Powerlessness
- Trusting others
- Valuing Freedom
- Letting Go & Embracing Whole
- Supports Communication & Creativity



Wu Wei (Non-doing)

- Stepping Out of the Way
- Letting Events take their course, with patience, confidence, open, accepting attention
- Not Directing or Controlling Events, rather Midwiving Constructive Movement of Larger Forces at Play
- Holistic
- Patience
- Dancing to the Universal Tune

Back to Earth

- Holding One's Tongue
- Letting Another Struggle with a Problem & Find Solution
- Silence Permitting Truthful Expression or Insight
- Tact
- Forces in Negotiation Drive Towards Resolution: Risk, Cost, Time, Relations

Learning from Water

- Not Claiming Credit (2)
- Not Possessing (10)
- Not Relying on Own Ability (2)
- Tranquility (57)
- Simplicity (48, 57)
- Softness (38)
- Stitch in Time (63)
- Fractionating (64)
- Spontaneous Transformation (37)

A Lesson from Tai Chi Push Hands

- Continuous Relatedness
- Harmonious Whole
- 4 ounces of pressure
- Continuing Adjustment
- Receptivity
- Listening for Strength
- Not Rushing to Caucus
- Working Through the Knotty Problem

Tips From The Ancients On Mediator Qualities

The ancient Masters were profound and subtle.
Their wisdom was unfathomable.
There is no way to describe it;
all we can describe is their appearance.

They were careful
as someone crossing an iced-over stream.
Alert as a warrior in enemy territory.
Courteous as a guest.
Fluid as melting ice.
Shapable as a block of wood.
Receptive as a valley.
Clear as a glass of water.

Do you have the patience to wait
till your mud settles and the water is clear?
Can you remain unmoving
till the right action arises by itself?

The Master doesn't seek fulfillment.
Not seeking, not expecting,
she is present, and can welcome all things.

KEEP IT THE PARTIES' PROCESS

When the Master governs, the people
Are hardly aware that he exists.
Next best is a leader who is loved.
Next, one who is feared.
The worst is one who is despised.

If you don't trust the people,
You make them untrustworthy.

The Master doesn't talk, he acts.
When his work is done,
The people say, "Amazing:
We did it, all by ourselves!"

Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

Communicate Trust & Good Will To Build Trust and Good Will

The Master has no mind of her own.
She works with the mind of the people.

She is good to people who are good.
She is also good to people who aren't good.
This is true goodness.

She trusts people who are trustworthy.
She also trusts people who aren't trustworthy.
This is true trust.

The Master's mind is like space.
People don't understand her
They look to her and wait.
She treats them like her own children.

Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

DO NOT RUSH
(TO EVALUATION OR SETTLEMENT)

Prevent trouble before it arises.
Put things in order before they exist.
The giant pine tree
Grows from a tiny sprout.
The journey of a thousand miles
Starts from beneath your feet.

Rushing into action, you fail.
Trying to grasp things, you lose them.
Forcing a project to completion,
You ruin what was almost ripe.

Therefore the Master takes action
By letting things take their course.
He remains as calm
At the end as at the beginning.
He has nothing,
Thus has nothing to lose.

Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

LISTEN RECEPTIVELY

Those who know don't talk.
Those who talk don't know.

Close your mouth,
Block off your senses,
Blunt your sharpness,
Untie your knots,
Soften your glare,
Settle your dust.

Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

Be Flexible

Men are born soft and supple;
Dead, they are stiff and hard.
Plants are born tender and pliant;
Dead, they are brittle and dry.

Thus whoever is stiff and inflexible
Is a disciple of death.
Whoever is soft and yielding
Is a disciple of life.

The hard and stiff will be broken.
The soft and supple will prevail.

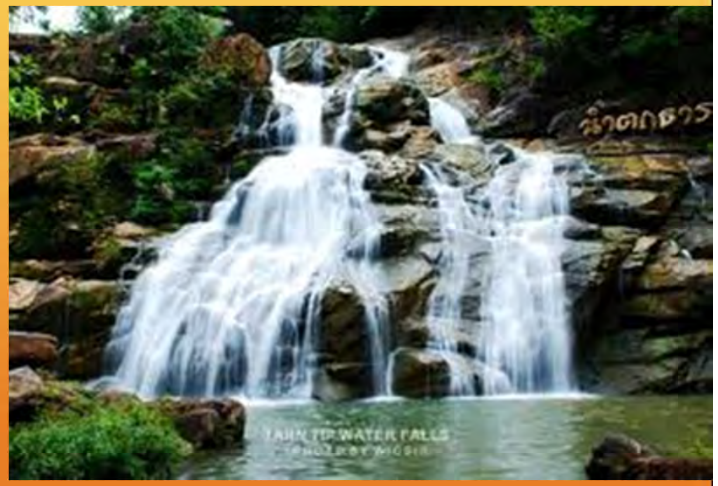
Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

Leading by Being Below

All streams flow to the sea
Because it is lower than they are.
Humility gives it its power.

If you want to govern the people,
You must place yourself below them.
If you want to lead the people,
You must learn to follow them.

The Master is above the people,
And no one feels oppressed.
She goes ahead of the people,
And no one feels manipulated.
The whole world is grateful to her.
Because she competes with no one,
No one can compete with her.



Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

Letting Change Occur

If you want to shrink something,
You must first allow it to expand.
If you want to get rid of something,
You must first allow it to flourish.
If you want to take something,
You must first allow it to be given.
This is called the subtle perception
of the way things are.

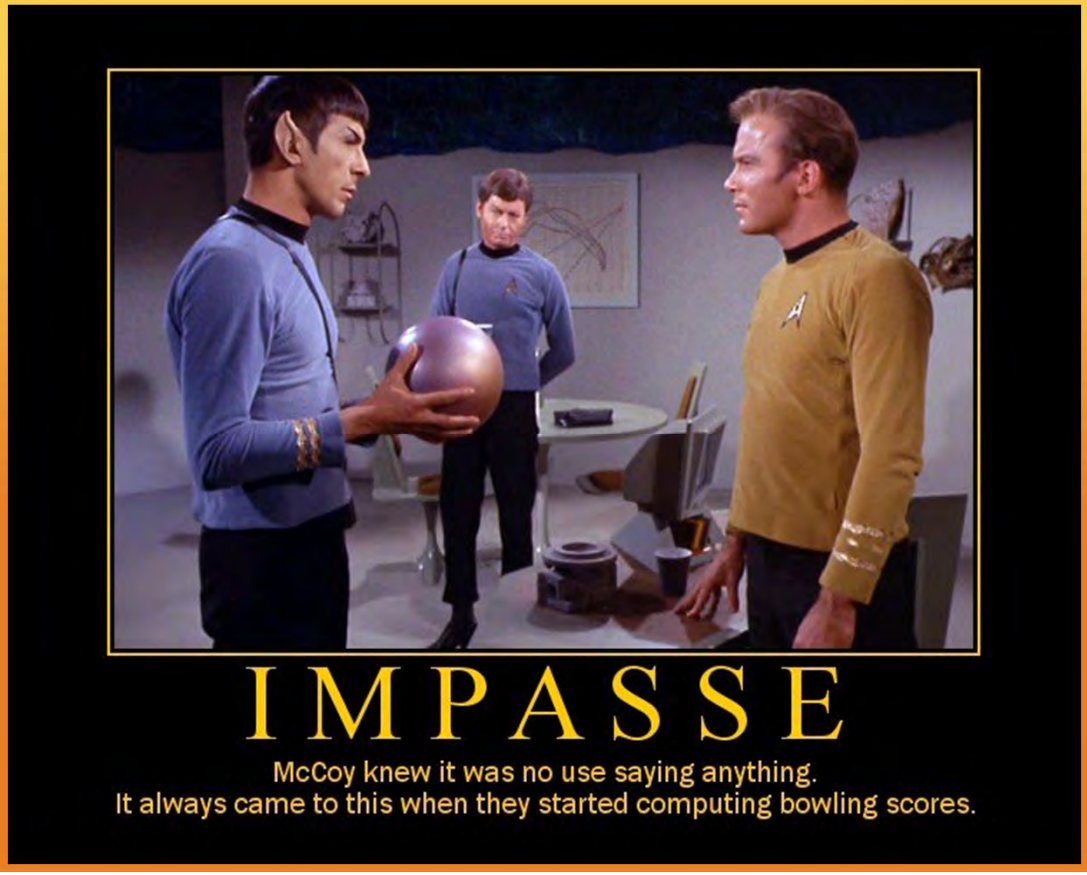
The soft overcomes the hard.
The slow overcomes the fast.
Let your workings remain a mystery.
Just show people the results.

Quotations from Mitchell, S. (trans.) (1991). Tao te Ching. New York, Harper & Row.

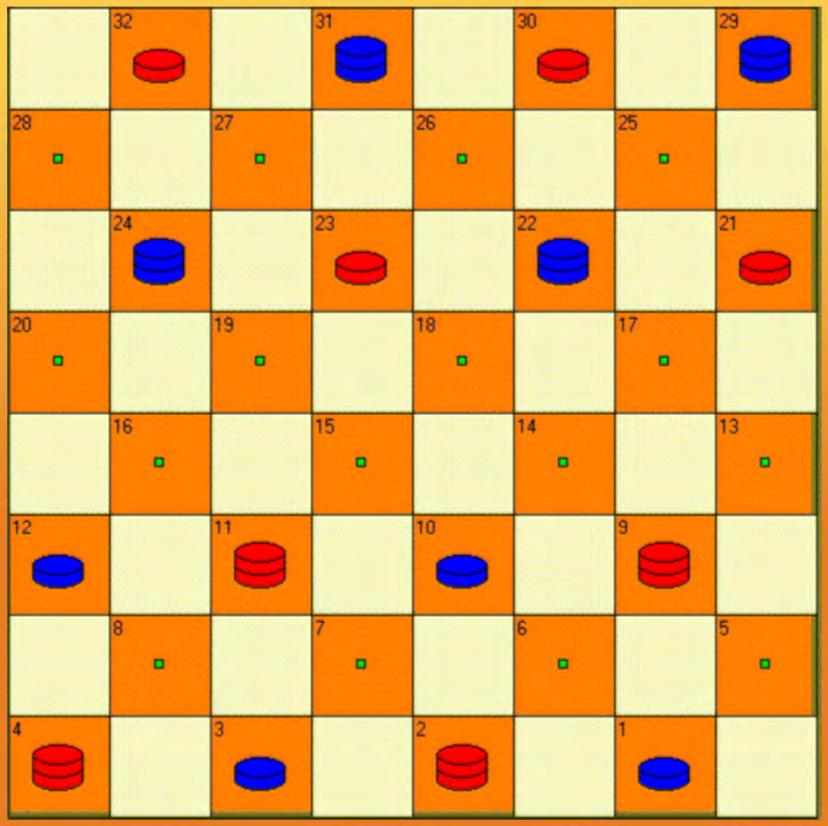
Trends in Mediation

- Len Riskin – Mindfulness
- Peter Adler - Protean Negotiation

New Frontiers
Beyond
Impasse



"We've reached an impasse. He loves my salary but hates my cat."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